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In The

Supreme Court of the United States

October Term 1964

EASTERN AIR LINES, INCORPORATED and
NATIONAL AIRLINES, INCORPORATED,

Petitioners,

—v.—

NORTHEAST AIRLINES, INCORPORATED and
THE CIVIL AERONAUTICS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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NORTHEAST AIRLINES, INCORPORATED and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioners, Eastern Air Lines, Incorporated and National Airlines, Incorporated jointly pray that a writ of certiorari issue to review a final order of the United States Court of Appeals for the First Circuit, entered on April 13, 1965, without an opportunity for Petitioners to be heard, which order remanded the case to the Civil Aeronautics Board for further proceedings consistent with the Court's interpretation of the Board's order and of the requirements of §7(d) of the Administrative Procedure Act, 5 U.S.C. 1006(d).

Opinions Below

The opinions and orders of the Court below, which are not yet reported, and of the Civil Aeronautics Board (Orders E-21550, Dec. 1, 1964 and E-21872, Mar. 5, 1965) which are not officially reported, are reproduced in the separately bound Appendix hereto.[1]

Jurisdiction to Review

The date of the opinion and order of the Court of Appeals sought to be reviewed is April 13, 1965. The dates of the Board's Orders under review are December 1, 1964 and March 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1958).[2]

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[1] Review is sought of the First Circuit's April 13, 1965 opinion and order, which was entered in regard to the Board's Orders E-21550 and E-21872. For completeness the Appendix also reproduces the Court's Order of October 17, 1963, denying intervention to Eastern and National in the review proceedings, and of November 6, 1963, allowing Eastern and National to file briefs *amici curiae;* Board Order E-22084 (Apr. 26, 1965) entered in response to the Court's April 13, 1965 Order sought to be reviewed; the Court's Order of April 28, 1965 allowing Eastern and National to comment on the Board's Motion filed in Court pursuant to Order E-22084; and the Court's Opinion and Order of May 11, 1965. An earlier decision of the Court of Appeals is reported at 331 F.2d 579 (1st Cir. 1964).

[2] Insofar as may be necessary, Petitioners also invoke 28 U.S.C. §1651 (1958) out of abundance of caution in view of the fact that they had neither been granted nor denied intervention (except *"sub silentio,"* see opinion of May 11, 1965 at 2, Appendix 205a) at the time the Court below entered the order now complained of, one of the grounds of complaint here being that Petitioners were not allowed to be heard prior to entry of that order, which had the effect of reversing prior Board Orders that granted petitioners substantial and important rights.

Questions Presented

1. When, in a proceeding for judicial review of an Order of the Civil Aeronautics Board denying renewal of a temporary certificate of public convenience and necessity, the Court of Appeals is presented with a Motion For an Order Directing the Board to Receive Further Evidence, may, consistent with due process, such an order be entered without affording air carriers, which were parties to the agency proceeding and which actively contended for the denial of renewal and bore a major share of the burden of developing the record there, the opportunity to be heard on the questions of law and fact presented?

2. Where the Civil Aeronautics Board has concluded, on the basis of the evidentiary record, to deny the application of an air carrier for renewal of a temporary certificate, and then takes notice of uncontested facts contained in official air carrier reports to the Board in order to determine whether a different result be required or the record reopened, does §7(d) of the Administrative Procedure Act require that a party be permitted to show the contrary of inferences drawn by the Board from the uncontested facts by means of adducing additional facts through expert testimony, and forecasts and by updating the record to as recent a date as possible when there has been neither showing nor finding of prejudicial error?

Statutes Involved

Section 7(d) of the Administrative Procedure Act of 1946, 60 Stat. 241; 5 U.S.C. 1006(d):

> (d) RECORD—The transcript of testimony and exhibits, together with all papers and requests filed in

the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 10(e), Administrative Procedure Act, 60 Stat. 243; 5 U.S.C. 1009(e):

SCOPE OF REVIEW—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement

In 1956, the Civil Aeronautics Board (the Board) issued a 5-year temporary certificate of public convenience and necessity to Northeast Airlines, Inc. (Northeast), authorizing Northeast to engage in air transporation beyond its then southern terminal New York to the terminal Miami, Florida via Philadelphia, Baltimore, Washington, D. C., Jacksonville, Tampa and St. Petersburg/Clearwater. *New York-Florida Case,* 24 C.A.B. 94 (1956). Northeast operated under that certificate and, pursuant to the provisions of §9 (b) of the Administrative Procedure Act and the stay granted by the First Circuit on October 17, 1963, continues so to operate today. Such operations are in direct competition with the services of Petitioners.

In June 1961, the Board set down a proceeding known as the *New York-Florida Renewal Case,* CAB Docket 12285 *et al.,* to determine whether public convenience and necessity required continuation of a third carrier in the market. After hearings, which were initially delayed some six months by the acquisition of control of Northeast by the Hughes Tool Company and which were lengthy, amassing some 11,000 pages of record, the Board's Examiner issued an Initial Decision recommending that three carriers were required on the East Coast-Florida route, but that Northeast, which had sustained losses of about $44,000,000 between the time of its entry into Florida markets in 1957 and the end of 1962, was not fit, willing and able within the meaning of §401 (d) of the Federal Aviation Act of 1958, 72 Stat. 754, 49 U.S.C. 1371(d), to provide the service.

By its Opinions and Orders E-19910 and E-20073 of August 15, 1963 and October 8, 1963, respectively, the

Board, adopting many of the Examiner's factual findings, concluded that the public convenience and necessity did not require the renewal of Northeast's authority south of New York or the certification of any other carrier in lieu of Northeast.

Thereafter Northeast sought review by the United States Court of Appeals for the First Circuit. Jurisdiction to review was vested in that Court by §1006 of the Federal Aviation Act of 1958, 72 Stat. 715, 49 U.S.C. 1486, which provides that venue to review lies either in the Court of Appeals for the District of Columbia Circuit, or in the Court of Appeals for the Circuit in which the petitioner for review has its principal place of business. In Northeast's case, the principal place of business was deemed to be Massachusetts.

The First Circuit granted a motion of Northeast to stay the effective date of the Board's denial of Northeast's application. It also denied motions of petitioners here to intervene (Appendix 1a), but permitted petitioners to file briefs *amici curiae* (Appendix 3a). In due course, briefs were submitted to the Court. Oral argument was heard from Northeast and the Board. Petitioners here were not permitted to be heard on oral argument.

Your petitioners sought writs of certiorari from this Court to the First Circuit on the question of denial of intervention. The Solicitor General and the Board supported the contention that petitioners should have been permitted to intervene, but suggested that the matter be held in abeyance pending a determination whether the controversy in the First Circuit should "prove to be a

live and significant one."[3] Those petitions were thereafter denied, 376 U.S. 931 (1964).

On May 8, 1964, the First Circuit found the Board had not properly articulated its reasoning and entered an opinion and order remanding the proceeding to the Board for an explicit statement of the "issues actually decided and a statement of relevant bases for its decision supported by intelligible findings of fact." That opinion is reported in *Northeast Airlines* v. *Civil Aeronautics Board*, 331 F.2d 579 (1st Cir. 1964). Immediately thereafter, on May 13, 1964 the Board invited the views of all parties concerning further action. Submitting their views, the parties urged, *inter alia*, that developments since the close of the record—traffic growth and financial prospects of the parties, general economic conditions, etc., none of the essential facts being in dispute—supported their respective positions. Eastern and National argued that those developments showed no public interest requirement for a third carrier, and Northeast maintained they did. On December 1, 1964, the Board issued its Opinion On Remand, (Appendix 5a). That Opinion, after discussing at length the statutory standards applied by the Board and the evidence adduced in the proceeding, reached the same ultimate conclusion as the prior Board opinion and order, namely that Northeast's authority should not be renewed. In so concluding it stated (Appendix 7a-8a):

> "The Court specifically declined to determine whether the record is legally sufficient, stating that it was uncertain as to the basis for denial of the application. Nor do we believe that reopening of the record is required as a matter of administrative discretion. The present record is well documented and sufficiently current. It contains actual operating experience

[3] See Memorandum for the Civil Aeronautics Board, in Nos. 720 and 766 (October Term 1963), January 1964.

through the first quarter of 1963. The evidence has been thoroughly analyzed by the parties, and the legal and policy issues involved have been fully explored. Moreover, the Board has before it and may properly consider statistical reports filed by the carriers since the formal closing of the evidentiary record and other stipulated materials. As hereinafter appears, these latter materials do not in our opinion indicate sufficient change in circumstances to warrant reopening. Accordingly, we conclude that there is presently before the Board a firm basis for decision and that we should proceed directly to a final decision in this case."

It then went on to detail, in a 48-page opinion accompanied by 103 mimeographed pages of appendix material, the findings and evidence supporting its conclusion. Two of the five members of the Board dissented.

Northeast sought reconsideration of the Board's December 1, 1964 Order, claiming that the Board had relied on facts reported by Northeast and by other carriers in their official reports to the Board which were not in the evidentiary record and that, pursuant to §7 (d) of the Administrative Procedure Act, it wanted to introduce evidence on rehearing in rebuttal to the ultimate finding of the Board that Northeast had no reasonable prospects for financial success in its Florida operations, and that the Board's—(unspecified by Northeast)—subsidiary findings underlying such ultimate conclusion were based on official notice of facts outside the record and were erroneous. Northeast offered to show, not the contrary of facts noticed by the Board, but other and more recent alleged facts, and "expert" testimony which, it contended, would show the opposite of the inferences which the Board, in the exercise of its administrative expertise, had drawn.

Answers were filed to Northeast's petition, and thereafter the Board issued its Opinion and Order on Recon-

sideration concluding, for the fourth time, that public convenience and necessity did not require grant of Northeast's application, and stating, *inter alia*, that (Appendix 168a-69a):

> "In reconsidering our decision pursuant to the Court's mandate, the evidence upon which we based our original determination with respect to Northeast's prospects for economic operation led us to the same conclusion that it had before. Before reaching a final conclusion, however, we deemed it appropriate to look to more recent operating results and traffic statistics in order to determine whether a different result was required or, at least, whether the proceeding should be reopened for further exploration of the question. Upon the basis of Northeast's experience through the first quarter of 1964 and of the East Coast-Florida traffic through the year 1963, we concluded that our original judgment was sound." [4]

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[4] "In our original opinion, we had relied upon Northeast's results and traffic volume through the first quarter of 1963. We think this was obviously a sufficiently representative period upon which to base reasonable judgment as to Northeast's prospects for economic operations, embracing as it does Northeast's actual experience and the total traffic for the entire 6½ year period subsequent to the carrier's certification. Northeast apparently concedes this *for purposes of a decision favorable to it*, since its position on remand was that the Board should, without further ado, grant the renewal application.

"Northeast is in error when it asserts that 'the formal record was closed . . . on August 30, 1962 and contained complete data only through the first quarter of 1962' (Petition, p. 8). While the taking of testimony was completed on August 30, 1962, the parties continued to supply for the record monthly traffic statistics in accordance with the Bureau's revised request for evidence (Section II.B). This material was supplied through the first quarter of 1963 and both the majority and the minority relied upon it in their original opinions. Indeed, Northeast itself relied upon it in its brief to the Board."

The Board went on to affirm its conclusion of December 1, 1964.

Northeast sought judicial review from the First Circuit. In addition it filed a motion to the First Circuit for an

Order Directing the Board to receive Further Evidence. The Board filed a memorandum in opposition. Eastern and National, not having been granted leave to intervene, were not authorized to file any response to Northeast's motion although they had filed petitions for leave to intervene on April 2, 1965 and April 8, 1965, respectively.

On April 13, 1965 the Court of Appeals, without affording your Petitioners an opportunity to be heard despite the fact that motions for leave to intervene were then pending, entered its order remanding the matter to the Board for further proceedings wherein Northeast was to be permitted to "show the contrary" of the inferences and judgments of the Board (drawn from undisputed facts properly subject to official notice) by means of adducing further, different and more recent facts and by updating the record through "expert testimony" and forecasts of future results (Appendix 191a).

On April 26, 1965 without hearing from, or inviting the views of, the parties to the proceeding before it, the Board issued its Order E-22084 (Appendix 197a) in which it stated that it had decided not to seek review of the Court's April 13, 1965 decision, and that, in view of the fact that the further proceedings ordered by the Court—(including the updating of the record)—would be extensive, it had determined to reopen the whole matter as to all issues and all applications for authority in all markets. That Order was then submitted to the First Circuit for approval and for dismissal or remand of the petitions for review. At that point, the First Circuit on April 28, 1965 issued an order inviting from Eastern and National responses to the Board's Motion for Dismissal or Remand. Such responses were filed May 3, 1965, in which it was asserted, *inter alia*, that Eastern and National should have

been permitted to intervene, that the Court's order of April 13 was entered without hearing from Eastern and National and that Eastern and National were aggrieved by that order.

On May 11, 1965, the Court of Appeals approved the Board's action, granted belated leave to Eastern and National to intervene so they might seek certiorari, stating that their intervention had earlier been denied *sub silentio,* dismissed the petitions pending before it and relinquished jurisdiction. The Order was marked to become effective May 21, 1965 (Appendix 204a).

Thus, at the end of some four years of litigation at a cost of many thousands of dollars, Eastern, National and all other parties would be put right back where they started, and the four decisions of the Board upon the question of public convenience and necessity for air transportation would go for naught as a result of a First Circuit decision that specifically stated it was not a decision "on the merits" (Appendix 193a) and on which decision your Petitioners were never afforded an opportunity to be heard.

Petitioners here seek certiorari to review the important question whether due process of law is violated when intervention (and therefore the opportunity to be heard) is denied and not granted until *after* a decision has been made which will adversely affect petitioners' substantial property and financial interests. Second, and of perhaps greater import, is the question of the correctness of the First Circuit's interpretation of §7(d) of the Administrative Procedure Act. That interpretation appears to be in conflict with leading decisions of this Court on the matter of official notice by administrative agencies, as well as in conflict with decisions of other Circuits and

is at war with prevailing practices before agencies. If allowed to stand, it will render it virtually impossible for any agency finally to determine any matter in which the hearing and decisional process require the passage of substantial time, and will destroy, as a decisional tool, that vital aid to the decisional process—official notice. It is submitted that an important question of federal administrative law is presented which warrants disposition by this Court.

Reasons for Granting the Writ

This Case Presents the Important and Recurrent Issue of the Rights of Parties to Administrative Proceedings to Be Allowed to Intervene in Judicial Review of Agency Action in Time to Be Afforded a Hearing, and the Important and Pervasive Issue of the Extent to Which Administrative Agencies, in Disposing of Lengthy Licensing Cases, are to be Permitted to Take Notice of Facts Outside the Record Without Violating the Requirements of §7(d) of the Administrative Procedure Act.

I.

The Denial of Intervention Until After Hearing And Decision Deprived Petitioners Of Right Recognized By Controlling Precedents.

The Federal Aviation Act of 1958 provides in Section 1006[4] that any person "disclosing a substantial interest" in any order of the Board, affirmative or negative, may seek review thereof in a Court of Appeals where venue is found. The Act, however, contains no express provi-

[4] 72 Stat. 795, 49 U.S.C. 1486.

sion relating to intervention by parties who have prevailed before the Board and who seek to support the Board's order under judicial review.[5] The majority of the Courts of Appeals nevertheless permit such intervention without discussing the issue.[6] Two Circuits—the First[7] and the Seventh—have a conflicting policy, and refuse to permit intervention. Very recently, the Second Circuit has denied such an intervention. This Court has now granted certiorari to review the decisions of the Second Circuit and of the Seventh Circuit. *UAW* v. *Fafnir Bearing Co., cert. granted,* —— U.S. ——, 85 S. Ct. 1087 (1965); *UAW* v. *Scofield, cert. granted,* —— U.S. ——, 85 S. Ct. 666 (1965). The first question presented here differs from the above two cases only in that the First Circuit permitted petitioners to intervene at the end of the proceedings below—*after* it had reached its decision—and *solely* for the purpose of allowing Eastern and National to seek certiorari. Basically, then, the same considerations are involved. Those considerations are that denial of intervention (1) infringes upon the Constitutional guarantees of due process of law, (2) presents a clear conflict among the Circuits, (3) makes fortuity controlling upon the right of intervention, and (4) is subject to this Court's remedial review and correction under its general supervisory authority over the administration of justice in Federal courts.

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[5] The Act permits intervention by interested persons in proceedings for *enforcement* of the provisions of the Act. (Section 1009; 72 Stat. 796, 49 U.S.C. 1489). It also gives private persons the right to enforce certain provisions (Section 1006(2)).

[6] See Subpart I.B. below.

[7] *Amalgamated Meat Cutters* v. *NLRB,* 267 F.2d 169 (1st Cir.), *cert. denied, sub nom. Geilich Tanning Co.* v. *Amalgamated Meat Cutters,* 361 U.S. 863 (1959). *Northeast Airlines* v. *CAB* (printed in Appendix hereto at 1a), *cert. denied sub nom. In re Petitions of Eastern and National Airlines,* 376 U.S. 931 (1964), upon the representation of the Board and the Solicitor General that certiorari was then untimely.

A. *The ruling of the First Circuit infringes due process.* The Courts have always held that a competitor is entitled to intervene before the Board and to obtain review of adverse Board orders. *E.g., Seaboard & Western Air.* v. *CAB,* 181 F.2d 515 (D. C. Cir. 1949), *cert. denied,* 339 U. S. 963 (1950). And where due process applies it does so from the beginning to the end of the adjudicatory proceedings.[8] It includes equal opportunity to invoke and to participate in appellate judicial review.[9]

Thus the due process injury in denial of participation in the Court of Appeals is clear at the stage when the case is heard before that Court. For, the party denied intervention continues in a non-party status which is inconsistent with this Court's announced policy that orderly determination of issues "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States* v. *Louisiana,* 354 U.S. 515 (1957). It is no answer that the latter day intervenor may protect his rights by participation in further agency proceedings at the conclusion of which he might seek judicial review of an order running against him. The notion that an *"ex post facto"* judicial hearing suffices to protect the rights of a party is inconsistent with this Court's ruling in *Ashbacker* v. *FCC,* 326 U.S. 327 (1945).

In the past, intervention has been denied by certain Circuit Courts of Appeals in cases arising out of appeals

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[8] See *Morgan* v. *United States,* 298 U.S. 468 (1936); *Saunders* v. *Shaw,* 244 U.S. 317 (1917); *Frank* v. *Mangum,* 237 U.S. 309, 327 (1915); *Hopt* v. *Utah,* 110 U.S. 574 (1884); *cf. Ashbacker* v. *FCC,* 326 U.S. 327 (1945); *Columbia Broadcasting System* v. *United States,* 316 U.S. 407 (1942); *Western Pacific* v. *Southern Pacific Co.,* 284 U.S. 47 (1931).

[9] *Price* v. *Johnston,* 334 U.S. 266, 280 (1948); *Saunders* v. *Shaw,* 244 U.S. 317 (1917). See also *Coppedge* v. *United States,* 369 U.S. 438, 447-448 (1962); *Chessman* v. *Teets,* 354 U.S. 156 (1957); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Cole* v. *Arkansas,* 333 U.S. 196, 201-202 (1948); *International Steel & Iron Co.* v. *National Surety Co.,* 297 U.S. 657, 665 (1936).

of orders of the NLRB. This line of cases includes *Amalgamated Meatcutters* v. *NLRB*, 267 F.2d 169 (1st Cir.), *cert. denied, sub nom. Geilich Tanning Co.* v. *Amalgamated Meatcutters*, 361 U.S. 863 (1959), the First Circuit's leading precedent. Those cases had been justified on the basis of the statutory provision making the NLRB the sole agency for abating unfair labor practices. See 29 U.S.C. §160 (a) (1958). However, this Court has evidenced its concern with those decisions in the *Scofield* and the *Fafnir Bearings* cases previously mentioned, to review which it has granted certiorari. The right of intervention on review of decisions of the Civil Aeronautics Board in route proceedings is much clearer, inasmuch as a favorable decision by the Board on a route award gives the successful litigant before the agency definite and enforceable rights, whereas the National Labor Relations Act gives him none. Section 1007 (a), of the Federal Aviation Act, 49 U.S.C. §1487(a) (1958), provides in pertinent part:

> "[I]n the case of a violation of section 401(a)[10] of this Act, any party in interest may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act . . . and such court shall have jurisdiction to enforce obedience thereto. . . ." (Footnote added.)

Thus, Petitioners here would, upon the successful defense of the Board's decisions in the proceedings at issue, have had a right to go into a Federal district court to enjoin operations by Northeast over the route at issue. The rights Petitioners seek to protect by intervention in a review proceeding on the side of the Board for the pur-

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[10] Section 401 (a) makes it unlawful for any person to engage in air transportation without a certificate of public convenience and necessity authorizing such transportation. See 49 U.S.C. §1371 (a) (1958).

pose of upholding the Board's order are real, vital and important rights of the Petitioners themselves. Those rights, as shown, are far stronger than the rights that may be asserted by the successful litigant in an unfair labor practice case before the NLRB.

B. *Conflicts Between the Courts of Appeals Are Manifest.* There is a conflict of law among the Circuit Courts on the question of intervention in appeals of orders of the Civil Aeronautics Board. So far as we are aware, no competing carrier, having a direct and substantial interest in the preservation of a CAB decision in a route case has been refused leave, except by the First Circuit here, to intervene and protect that decision upon appeal. On the contrary, intervention has uniformly been allowed without discussion or dissent. Indeed, we are aware of no case where the matter has ever been litigated. *E.g., Nebraska Dep't of Aeronautics* v. *CAB*, 298 F.2d 286 (8th Cir. 1962); *Airport Comm'n of Forsyth County* v. *CAB*, 296 F.2d 95 (4th Cir. 1961); *Delta Air Lines, Inc.* v. *CAB*, 275 F.2d 632 (D.C. Cir. 1959), *cert. denied, sub nom., Trans World Airlines, Inc.* v. *Delta Air Lines, Inc.*, 362 U.S. 969 (1960); *Eastern Air Lines, Inc.* v. *CAB*, 271 F.2d 752 (2d Cir. 1959), *cert. denied*, 362 U. S. 970 (1960); *Delta Air Lines* v. *CAB*, 247 F.2d 327 (5th Cir. 1957); *United Air Lines, Inc.* v. *CAB*, 198 F.2d 100 (7th Cir. 1952); *Western Airlines, Inc.* v. *CAB*, 196 F.2d 933 (9th Cir.), *cert. denied* 344 U.S. 875 (1952); *Southwest Airways Co.* v. *CAB*, 196 F.2d 937 (9th Cir. 1952); *State Airlines, Inc.* v. *CAB*, 174 F.2d 510 (D. C. Cir. 1949), *rev'd on other grounds*, 338 U.S. 572 (1950); *American Airlines, Inc.* v. *CAB*, 178 F.2d 903 (7th Cir. 1949).[11]

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[11] Interestingly enough the Seventh Circuit, where the *Scofield* case, *supra*, arose out of that circuit's denial of intervention in review of an

C. *Intervention Is Controlled By Fortuity in the Absence of an Authoritative Policy.* The conflict between the circuits is particularly significant in that §1006 of the Federal Aviation Act, 49 U.S.C. §1486, provides that review may be taken either to United States Court of Appeals for the District of Columbia Circuit or to the Court of Appeals for the Circuit wherein the petitioner resides or has his principal place of business. Thus, if Northeast had elected to seek review from the District of Columbia Circuit (which receives the great bulk of appeals from the CAB), Eastern and National would have been granted intervention automatically. However, Northeast, by choosing the First Circuit, as it had a right to do under the statute, was able to bar its competitors, your Petitioners, from participating in the judicial review proceedings. Ironically enough, Northeast has been allowed to intervene in support of CAB orders beneficial to it without question of its right to do so in two recent appeals by your Petitioners challenging those orders. *National Airlines, Inc.* v. *CAB,* 321 F.2d 380 (D.C. Cir. 1963); *National Airlines, Inc.* v. *CAB,* 306 F.2d 753 (D.C. Cir. 1962). However, when Eastern and National received a decision beneficial to them, the same adverse parties (Eastern and National) in the proceedings just cited were deprived of intervention to protect their interests when Northeast elected to seek review in the First Circuit. Intervention was not granted until it was too late to affect decision.

D. *An Appropriate Supervisory Issue Is Presented.* The above conflict of rules in different circuits on a matter involving rights of substance and importance requires this Court's review and harmonization.

NLRB proceeding, has granted intervention in appeals of CAB cases, as indeed, appears to have been its former practice with regard to NLRB appeals.

In enacting the statutory procedures for review of CAB action, Congress must have envisioned orderly continuation of the Board proceedings, where all parties have full status as litigants. Yet, if the First Circuit's policy on intervention is not reviewed, sheer fortuity will control the rights of the parties before the Board to participate in court review proceedings.

The District Courts are given statutory powers of review over numerous federal agency decisions.[12] Rule 24 of the Federal Rules Procedure provides for intervention of right when a statute confers such right or when representation by existing parties may be inadequate and the applicant may be bound by the judgment. It grants permissive intervention when the applicant's claim or defense has a question of law or fact in common with the pending action. Under the standards of Rule 24 applicable to review proceedings in the District Courts, the reasoning of *Textile Workers Union of America* v. *Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955), *cert. denied, sub nom. Allendale Co.* v. *Mitchell*, 351 U.S. 909 (1956) that intervention must be granted to the prevailing party before a federal agency if the agency ruling is judicially challenged, seems unexceptionable. To the same effect, see *Atlantic Ref. Co.* v. *Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962). There is no question that Eastern and National as prevailing parties in the proceeding before the agency would be bound by the decision of the Court of Appeals. As pointed out above, they have a right under §1007 of the Federal

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[12] In addition to numerous specific statutes, district court jurisdiction is also available under §10(b) of the Administrative Procedure Act, 5 U.S.C. 1009 (b). See *Pan American World Airways* v. *CAB*, 207 F.Supp. 152 (D.D.C. 1962), *rev'd on other grounds, sub nom. Alaska Airlines* v. *Pan American World Airways*, 321 F.2d 394 (D.C. Cir. 1963), where a district court judge enjoined the carrying out of an order of the Civil Aeronautics Board setting a route case for hearing.

Aviation Act to obtain enforcement of the Board's order by Federal district courts. The Court's order invalidating that decision is, however, a bar to any action by Eastern or National predicated upon that statutory provision and thus Eastern's and National's right of action has been taken away. In *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944), the Court of Appeals held that adjoining land owners were entitled to intervene under Rule 24 (a) in a proceeding to enjoin the carrying into effect of a disputed zoning order, the Court holding at 507:

> "It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the extent of taking away their statutory right to an independent action based on the order."

To the same extent, Eastern and National are bound by the judgment of the Court of Appeals taking away their statutory right to enjoin Northeast's operations, which right had been granted by the Board's decisional order.

It is indeed anomalous that if the Board's order had been sustained and Eastern or National had sought injunctive relief under §1007 in the District Court of Massachusetts, Northeast would very clearly have been in a position to defend itself, but upon Northeast's seeking review of that order in the First Circuit, Eastern and National were denied intervention.

There is no difference in fact or logic between intervention on the issues presented by review proceedings in the Court of Appeals, and cases commenced in the district courts.

The prevailing party before the Federal Communications Commission, the Atomic Energy Commission, the Maritime Commission and the Department of Agriculture

enjoys a statutory right of intervention upon review of those agencies. 5 U.S.C. 1038(a). Such is also the case under the review statute applicable to the ICC, 28 U.S.C. 2323. *Hudson Transit Lines* v. *United States*, 82 F.Supp. 153 (S.D.N.Y. 1948), *aff'd*, 338 U.S. 802 (1949). That statute would appear to be simply declaratory of the long-accepted right of intervention in judicial review proceedings of CAB orders as it has been found by all circuits except the First Circuit.

It is paradoxical that the prevailing party before the agency actually *loses* in the First Circuit by virtue of his *success* below. If he had lost before the CAB, he unquestionably could have a right of appeal under §1006 of the Federal Aviation Act. See also §10 (a) of the Administrative Procedure Act, 5 U.S.C. 1009 (a). But having prevailed before the CAB, under the First Circuit's reasoning he may not participate as a party either in the Court of Appeals nor before this Court nor may he seek or oppose this Court's grant of review.[13]

If the ruling and policy of the First Circuit remain unreviewed, prevailing parties before the Civil Aeronautics Board (and before other agencies) can be denied participation in judicial review proceedings although they would enjoy that participation (1) if they had lost and not prevailed before the agency; (2) if the review petition had been filed instead in the District of Columbia Circuit; (3) if the review proceedings had arisen from agency orders reviewable under 5 U.S.C. 1038 or 28 U.S.C. 2323; or, (4) if the proceedings had been commenced in the District Court and thus been subject to Rule 24.

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[13] Unless, of course, the Court of Appeals, as a matter of grace, confers the status of intervenor upon him after the decision for the purpose of permitting him to seek review, as was done here.

Such captious and arbitrary results call for exercise of this Court's "general power to supervise the administration of justice in the federal courts." *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 344 U.S. 247, 260 (1953). This Court is accordingly requested to exercise its supervisory powers to bring the decision and policy of the First Circuit within the standards governing intervention in judicial review proceedings prevailing in the other Courts of Appeals.

II.

The Interpretation Placed On Section 7(d) Of The Administrative Procedure Act By The First Circuit Is Contrary To The Terms Of That Section, Conflicts With Decisions Of This Court And Of Other Courts Of Appeals, And With Long-Standing Practices Of Administrative Agencies And Would Render Many Administrative Proceedings Impossible Of Completion.

A. *Section 7(d) Was Interpreted Contrary to Law and Governing Precedent.*

It is shown below (subpart II, B) that the Court of Appeals failed to apply, or even consider, the rule of prejudicial error and that the decision would preclude any effective reliance upon official notice as part of the decisional process (subpart II, C). Here we are concerned with the court's interpretation of §7(d) contrary to the prevailing interpretation of that statute by the courts and the agencies.

Section 7(d) provides that where agency decision rests on official notice of a material fact not appearing in the evidence of record, any party shall on timely request be afforded an opportunity to show the contrary.

In its decisions, the Board looked at certain data such as Northeast's reported income statements and the reported statistics of traffic moving over the route in issue.[14] Those data were derived from Northeast's monthly, quarterly and/or annual reports filed with the Board by that carrier and certified by it as correct under the penalties of 18 U.S.C. 1001. They were also derived from traffic statistics filed with the Board by the carriers (including Northeast) and compiled in official CAB surveys of airline traffic. In addition, the Board made reference to a Trust Instrument which had been executed by Northeast, among others, and filed with the Board. The use of those materials was perfectly proper under the leading case of *United States* v. *Pierce Auto Frieght Lines*, 327 U.S. 515, 529-30 (1946); *Market Street Ry.* v. *Railroad Commission*, 324 U.S. 548, 559-62 (1945); *Wisconsin* v. *FPC*, 201 F.2d 183, 186-87 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934 (1953); *Great Lakes Airlines* v. *CAB*, 291 F.2d 354, 369 (9th Cir. 1961), and the past practice of the CAB and other agencies.

Northeast sought reconsideration asserting rights under §7(d). But at no point did it attempt to show the contrary of the *facts* to which the Board had looked. Instead it challenged the inferences drawn by the Board and claimed that it should be allowed in rebuttal and explanation to produce further, additional and more recent facts together with expert testimony and forecasts. Many of the additional facts which Northeast desired the Board to notice were set

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[14] It should be noted again, that the Board did so for two reasons: (1) in order to verify the conclusion reached on the evidence of record, and (2) in order to determine whether this proceeding should be reopened. The first reason is squarely in accord with *Market Street Ry.* v. *Railroad Commission*, 324 U.S. 548, 559-562 (1945). And the decision not to reopen is in accord with *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 534-535 (1946).

forth in its Petition for Reconsideration (of the Board's December 1, 1964 decision) as was the gist of what its experts might say. In its opinion on reconsideration, the Board not only considered Northeast's arguments, but it assumed that the additional facts advanced and the testimony proffered would be as Northeast claimed. It nevertheless found it would reach the same ultimate conclusion.

The action of the Court of Appeals in holding that Northeast must have yet a further opportunity to rebut and explain is not in accord with §7(d). Northeast had its opportunity and it took advantage of it on reconsideration when it presented all its arguments and additional facts to the Board. Section 7(d) requires no more. *American Trucking Association* v. *Frisco Transportation Co.*, 358 U.S. 133, 144 (1958).

Nor is the action of the Court of Appeals consistent with the decisions of this Court, and of other Courts of Appeals. In ordering the Board to permit Northeast to rebut inferences by means of expert testimony, forecasts and a general updating of the record, the First Circuit has held squarely contrary to such decisions. Thus, the Board is not bound by the testimony of an expert of a private party even if that testimony is the only expert testimony in the record. It may and should apply its own expertise to the facts of record. *Market Street Ry.* v. *Railroad Commission, supra; Radio Officers Union* v. *NLRB*, 347 U.S. 17, 48, 49 (1954); *Central Illinois PSC* v. *FPC*, 338 F.2d 682, 684 (7th Cir. 1964); *Spitzer* v. *Commissioner*, 153 F.2d 967, 972 (8th Cir. 1946). See also *Chicago, South Shore & South Bend R.* v. *United States*, 221 F.Supp. 106 (N.D. Ind. 1963).

Furthermore, the updating of the record which the First Circuit required is beyond the province of a reviewing

Court to order. *United States* v. *Pierce Auto Freight Lines, supra,* 327 U.S. at 534-535.

B. *The Statutory and Decisional Rule of Prejudicial Error Was Ignored.*

In both of its Orders upon remand from the First Circuit (E-21550 and E-21872), the Board expressly stated that it had reached its decision (not to renew Northeast's authority) on the basis of the evidentiary record, and had looked at official carrier reports (to the Board) of traffic and profit and loss only to verify the correctness of its conclusion and to determine whether events happening after the close of the record required the exercise of the Board's discretion to reopen the proceeding. In its opinion, the Court of Appeals did not conclude otherwise. It concluded only that the Board "chose to look at some subsequent matters," and that "having elected to look at such matters it could not pick and choose, at least to the extent of denying an objecting party the rights guaranteed, but by no means created, by §7(d) to rebut not only those matters it looked to, but also the inferences which were sought to be drawn therefrom." (Appendix 195a).

Section 7(d) does not, by its terms, prohibit the use of official notice. Nor, by its terms, does it require that the use of extra-record facts be followed, in every case, by an opportunity for a party to show the contrary. It states only that when agency decision *rests* on matters of official notice, such an opportunity shall be afforded.

The decision of the Board on the major issue of the proceeding—*i.e.,* renewal or nonrenewal of Northeast—did not *rest* on any matters other than those in the evidentiary record. The Board itself said so in both its opinions. And the Court of Appeals did not conclude to the contrary. It could not have done so. For, in declining

to pass "on the merits" (Appendix 195a) and in basing its decision solely on a determination that the Board had "opened the door to new data" and must therefore take a full look, it obviously could not have determined whether the agency decision *rested* on official notice of facts or whether it *rested,* as the Board said it did, on the facts of record. But before §7(d) can come into play, that question has to be determined. The plain words of the section permit no other interpretation.

In failing to make the above determination—a determination which it could hardly make short of accusing the Board of misrepresentation—the Court of Appeals ignored not only the words of §7(d) but also the requirement of §10(e) that due account be given in judicial review proceedings to the rule of prejudicial error. For, if the decision did not *rest* on matters of official notice, as the Board said it did not, but was grounded on substantial evidence of record, the use of officially-noticed facts did not prejudice Northeast.

The opinions of this Court and of lower tribunals except the First Circuit have made it abundantly clear that the use of official notice is not reversible error where the matters noticed are delineated in the opinion and where substantial prejudice does not result from such use. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 529-530 (1946); *Market Street Railway Co.* v. *Railroad Commission,* 324 U.S. 548, 559-562 (1945); *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 154, 155 (1941). In *Pierce Auto, supra,* this Court said that it—

> ". . . has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial

proceedings. On the contrary, in the one case as in the other, the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." (327 U.S. at 530).

The rule that substantial prejudice must be shown is incorporated in §10(e) of the Administrative Procedure Act.[15] And it has been followed by other Courts of Appeals since the passage of the Act. *State of Wisconson* v. *FPC*, 201 F.2d 183, 186-87 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934 (1953); *NLRB* v. *Johnson*, 310 F.2d 550, 552 (6th Cir. 1962); *Great Lakes Airlines* v. *CAB*, 291 F.2d 354, 369 (9th Cir. 1961). The first circuit, however, has ignored the rule and has held that whenever an agency uses any matter of official notice it has committed legal error and must reopen the proceeding.

C. *The Effect of the Decision Would Be to Disrupt Long-Standing Agency Procedures.*

The use of official notice is longstanding in administrative practice. The Civil Aeronautics Board constantly refers to matters in reports filed with it by carriers to assist in decision of cases before it, and as a check upon its decisions. *Washington-Baltimore Adequacy of Service Investigation*, 30 C.A.B. 1255 (1960), *affirmed, National Air Lines* v. *CAB*, 300 F.2d 711 (D.C. Cir. 1962); *Dallas to the West Service Case*, 29 C.A.B. 23, 30 (1959), *affirmed, Braniff Airways* v. *CAB*, 277 F.2d 334 (D.C. Cir. 1960); *Reopened Delta-C & S Mail Rate Case*, 28 CAB 820 (1959); *Southwest-Northeast Service Case*, 23 C.A.B. 42, 45 (1956); *Spearfish*

[15] See also Attorney General's Manual on the Administrative Procedure Act, p. 110. ". . . errors which have no substantial bearing on the rights of the parties will be disregarded." Significantly, the Manual relies on *Market Street Railway, supra.*

Suspension Case, 18 C.A.B. 657 (1954); *Latin American Air Freight Case,* 16 C.A.B. 107 (1952).

Other agencies also rely frequently on official notice. *E.g., In re Sears Roebuck & Co.,* 15 P. & F. Ad. L. 2d 748 (FTC 1964); *In re Bakers of Washington, Inc.,* 15 P. & F. Ad. L. 2d 399 (FTC 1964); *In re Cabinet Mfg. Corp.,* 144 N.L.R.B. 82, 14 P. & F. Ad. L. 2d 391 (1963); *El Paso Natural Gas Co.,* 23 F.P.C. 610 (1960); *In re Plant City Welding & Tank Co.,* 9 P. & F. Ad. L. 2d 264 (NLRB 1959); *N.Y. Central R. Co. Abandonment,* P. & F. Ad. L. 2d 1021 (ICC 1960); *In re Loading Rules—Cantaloupes,* 6 P. & F. Ad. L. 2d 81 (ICC 1956).

Agencies such as the Civil Aeronautics Board, the Federal Power Commission and the Interstate Commerce Commission, all of which are charged with the grant or denial of licenses, have before them cases which are complex and of long duration. Inevitably there are lengthy periods between the close of the record at the hearing and the date of agency decision. Although the law requires that agency decision be based upon substantial evidence of record, it cannot be construed to prohibit an agency from looking to the reports filed with it by the companies which it regulates in order to verify its conclusions in light of recent data or to determine whether a reopened record may be desirable because of such data.

Yet such is the effect of the decision of the First Circuit. For, on the one hand, that decision declares that concentration solely on the record without checking more recent data by official notice is subject to "criticism, legal or otherwise" (Appendix 195a) and, on the other, it holds that the evidentiary record should be reopened, explained and updated whenever such data are noticed. The result in lengthy licensing proceedings is obvious; the proceed-

ings would become interminable. The agency must use official notice to escape criticism. But, if it does, any person aggrieved will seek to reopen, explain and update. Thereafter, due to the lag in the decisional process, official notice must again be taken to avoid criticism. And, on application, another reopened, explanatory and updated proceeding must be held. And so on. We do not believe that the administrative process, already under attack for the length of its proceedings, can function properly under the decision of the First Circuit. We respectfully submit that this Court should review that decision.

CONCLUSION

The denial of intervention to petitioners herein precluded them from an opportunity to be heard. That denial is contrary to decisions of this Court, and in conflict with decisions of the Circuits. This Court should exercise its power of review and supervision to put this important question of Federal law beyond dispute.

The First Circuit's interpretation of §7(d) of the Administrative Procedure Act is contrary to decisions of this Court and also in conflict with decisions of other Circuits, and with the prevailing practices of the agencies. The correct application of the law in respect to official notice is of widespread importance to the administrative process. This Court is respectfully requested to review the action of the First Circuit and thereby to settle the law which all agencies must follow in respect to official notice.

Petitioners suggest that this Court upon review as requested herein may find it desirable to review and affirm the decisions of the Civil Aeronautics Board and thus terminate a proceeding already more than four years old

and involving almost one billion revenue dollars to date, and Petitioners respectfully ask the Court so to do.

Respectfully submitted,

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